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Nos. 84-621, 84-633, and 84-641

In the Supreme Court of the United States

OCTOBER TERM, 1984

KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

EDWARD K. WHEELER, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
Acting General Counsel

HENRI F. RUSH
Acting Deputy General Counsel

LAURENCE H. SCHECKER
JOHN J. McCARTHY, JR.
Attorneys
Interstate Commerce Commission
Washington, D.C. 20423

QUESTIONS PRESENTED

1. Whether a majority of the Interstate Commerce Commission approved the consolidation of these railroad holding companies.

2. Whether the court of appeals applied the proper standard of review in upholding the Commission's decision.

3. Whether the Commission and the court below properly concluded that the Commission is not required to impose conditions upon the merged railroad designed to increase competition if the conditions are not related to the anticompetitive effects of the merger.

4. Whether the Commission and the court of appeals correctly found that the Commission is required to provide protection only for employees of the railroads that are parties to the transaction.

5. Whether the court of appeals properly affirmed the Commission's finding that the price per share paid to minority shareholders pursuant to the merger was fair and reasonable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a[1]) is reported at 736 F.2d 708. The opinion of the Interstate Commerce Commission (Pet. App. 39a-615a) is reported at 366 I.C.C. 459.

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[1] "Pet. App." refers to the appendix filed by petitioners in No. 84-621.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1984. Petitions for rehearing were denied on July 20, 1984 (Pet. App. 621a-629a). The petitions for a writ of certiorari in No. 84-621 and 84-633 were filed on October 17 and 18, 1984, respectively. On August 2, 1984 the Chief Justice extended the time in which to file a petition for a writ of certiorari in No. 84-641 to and including October 19, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, Union Pacific Corporation (UPC), a railroad holding company, reached an agreement to acquire control of a second railroad holding company, Missouri Pacific Corporation (MP), and to merge with a third railroad holding company, Western Pacific Railroad Company (WP).[2] The parties filed applications with the Interstate Commerce Commission for authority to consummate these transactions pursuant to 49 U.S.C. 11343. Petitioners were among the numerous public and private parties who participated in the ensuing Commission proceeding.[3]

Petitioner Kansas City Southern Railway Company (KCS)[4] urged the Commission to deny the application filed by UPC and MP unless KCS received trackage rights over

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[2]These are the abbreviations that are used by the petitioners in No. 84-621 (Pet. ii n.*).

[3]Numerous railroads, shippers, governmental agencies (including the United States Department of Justice), state and local governments, stockholders, and labor organizations participated in the proceeding before the Commission (see Pet. App. 65a-77a). The proceeding lasted two years, involved ten months of oral hearings before two administrative law judges, and amassed a record consisting of over 18,000 pages of transcript and more than 600 exhibits (see *id.* at 5a-6a).

[4]The second petitioner in No. 84-621, Louisiana & Arkansas Railway Company, is a wholly-owned subsidiary of KCS.

certain MP railroad lines (Pet. App. 70a-71a, 240a). Trackage rights enable one railroad to operate over tracks owned by another railroad for a fee paid to the owner of the tracks. KCS argued that these rights were necessary both to offset what it asserted would be the anticompetitive effects of the consolidation and to enhance its inferior competitive position, which it conceded was unrelated to any anticompetitive effects of the consolidation (Pet. App. 70a-71a, 240a-242a).

Petitioners Brotherhood of Maintenance of Way Employes, et al. (BMWE),[5] argued (Pet. App. 76a) that railway labor interests would be harmed by the proposed consolidation. They advocated the imposition of conditions to protect not only the employees of the merging carriers but also employees of other railroads who might somehow be affected by the consolidation.

Petitioner Wheeler, a stockholder in WP, neither supported nor opposed the merger of UPC and WP. He argued that the price offered by UPC for the WP stock was neither fair nor reasonable (Pet. App. 299a-300a).

The Commission's review of the proposed consolidation was careful and complete (see Pet. App. 39a-615a). Pursuant to the standard contained in 49 U.S.C. 11344(b), the Commission examined the effect of the consolidation on the adequacy of transportation for the public, the effect on the public interest of including other railroads in the area in the proposed transactions, the total fixed charges that would result from the consolidation, and the interests of affected employees (Pet. App. 84a-105a, 276a-282a, 287a). The Commission thoroughly examined the competitive effects of the proposed transactions, and measured the proposals against the national transportation policy set

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[5]All of the petitioners in No. 84-641 are unions that represent railroad workers.

forth in 49 U.S.C. 10101a (Pet. App. 111a-168a, 358a-538a). The Commission also considered whether the transactions would cause any harm to any railroads' essential services (*id.* at 168a-172a). Finally, the Commission considered whether it should require the imposition of any conditions to protect the public or to protect other railroads (*id.* at 193a-250a).[6]

The Commission concluded that, provided certain conditions were imposed, the consolidation was consistent with the public interest (Pet. App. 55a-60a, 84a). It found that the consolidation would result in substantial public benefits without the loss of essential services (*id.* at 84a-104a, 168a-172a, 538a-594a). While some adverse competitive effects could have resulted from the consolidation (*id.* at 149a), the Commission determined that the grant of certain trackage rights to competing railroads would ameliorate the anticompetitive effects of the transactions (*id.* at 57a-58a, 220a, 229a-230a). The Commission did not require the granting of the trackage rights sought by petitioner KCS because it determined that the anticompetitive conditions cited by KCS did not result from the consolidation (*id.* at 240a-245a). The Commission concluded that employees' interests would be safeguarded by the "New York Dock Conditions" traditionally imposed for the protection of the employees of consolidating carriers, and declined to impose conditions to protect the employees of other railroads (*id.* at 276a-281a).[7]

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[6]The Commission addressed a number of other issues that are not relevant to petitioners' arguments in this Court. These issues include the effect of the Pacific Railroad Act, 45 U.S.C. 83, on the UPC/WP consolidation (Pet. App. 172a-193a); removal of certain traffic protective conditions (*id.* at 236a-238a); approval of certain settlements between various parties and the applicant railroads (*id.* at 250a-276a); and environmental considerations (*id.* at 282a-287a).

[7]The "New York Dock Conditions" refer to the labor protective conditions usually imposed by the Commission in rail mergers, which were developed by the Commission in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, aff'd, 609 F.2d 83 (2d Cir. 1979).

Finally, the Commission concluded that the price to be paid by UPC for the WP stock was fair and reasonable (*id.* at 298a-306a).

2. The Commission and the court of appeals denied several motions for a stay of the Commission's decision approving the consolidation, except for a temporary stay to enable the parties to seek a stay from this Court (Pet. App. 12a n.5). The application for a stay filed by KCS in this Court was denied by the Chief Justice, and the transactions were consummated. The application subsequently was referred to Justice Stevens, who in turn referred it to the entire Court, which also denied the application for a stay.[8]

3. The court of appeals affirmed the Commission's decision in all respects relevant to petitioners' claims before this Court (Pet. App. 1a-38a).[9] The court first addressed the challenges to the Commission's determination that the consolidation was consistent with the public interest (*id.* at 13a-26a).[10] It concluded that the Commission had given

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[8] *Southern Pacific Transp. Co.* v. *ICC*, No. A-544 (Jan. 10, 1984); *Atchison, T. & S.F. Ry.* v. *ICC*, No. A-545 (Jan. 10, 1984); and *Kansas City S. Ry.* v. *ICC*, No. A-546 (Jan. 10, 1984).

[9] The court of appeals remanded the proceeding to the Commission "for further consideration and explanation" of the agency's refusal to grant the request of Denver & Rio Grande Western Railroad Company (DRGW) for independent ratemaking authority over WP's tracks between Utah and Northern California (Pet. App. 32a-33a). This authority would have required the merged railroad to adopt automatically the rate set by DRGW over certain routings. The Commission did not seek review of this decision, and has reopened the proceeding to again consider this issue. *Union Pacific—Control—Missouri Pac.—Western Pac.*, Finance Docket No. 30,000, (severed July 31, 1984) (not printed).

[10] The court of appeals did not address directly the contention of petitioner KCS (see pp. 7-9, *infra*) that the Commission did not approve the consolidation by a majority vote. However, this argument was the basis of KCS's application for a stay and its motion for summary

proper recognition to the role of competition in analyzing the consolidation (*id.* at 14a, 17a-19a). The court observed that "[t]he Commission has always, and should continue, to perform a balancing test which takes a myriad of factors —including competition—into consideration and weighs 'the potential benefits to applicants and the public against the potential harm to the public' " (*id.* at 18a (citation omitted)).

The court rejected contentions by various parties that the Commission's analysis of the public benefits flowing from the proposed consolidation was flawed (Pet. App. 22a-24a). The court accepted the cost figures used in the Commission's analysis (*id.* at 23a), noting that the Commission performed a searching and critical analysis of the methodology and cost data submitted by the parties and made appropriate adjustments which represented an "exercise[] [of] its independent judgment and expertise with respect to the calculation of public benefits" (*id.* at 24a). The court deferred to the Commission in this "fact-bound and technical area" (*ibid.* (footnote omitted)).

The court of appeals also approved the Commission's decision to impose certain conditions on the consolidation to ameliorate any anticompetitive effects (Pet. App. 24a-29a). It upheld the Commission's denial of petitioner KCS's request for trackage rights (*id.* at 27a-29a) that were "concededly unrelated to the consolidation at issue" and therefore "not designed to mitigate any anti-competitive consequences stemming directly from the consolidation" (*id.* at 28a). The court held (*id.* at 29a) that "the Commission is not required to act as a roving ombudsman restructuring railroads on its own in order to satisfy an individual carrier's notion of what effective competition may require."

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reversal, each of which was denied by the court of appeals. The court took note of these prior actions in its opinion on the merits (Pet. App. 12a n.5).

The court of appeals rejected the labor petitioners' challenge to the agency's refusal to extend the "New York Dock Conditions" to the employees of non-applicant carriers (Pet. App. 33a-34a). It based its decision on its prior holding in *Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295, 323-324 (D.C. Cir. 1983), in which the court considered and rejected the same argument.

Finally, the court rejected petitioner Wheeler's challenge to the purchase price offered to WP stockholders. It concluded that the methodology used by the Commission to value the WP stock was reasonable and found that the Commission's conclusion that the offer for the stock was fair was supported by substantial evidence in the record (Pet. App. 35a-38a). In addition, the court concluded that there was substantial evidence to support the Commission's finding that the price resulted from arms' length negotiations between WP and UPC (*id.* at 37a). It held that the Commission took into account all relevant factors, including the enhanced value of the stock in light of the consolidation and WP's land holdings, in arriving at its independent judgment that the offer for the WP stock was fair (*ibid.*).

ARGUMENT

The detailed opinion of the court of appeals, upon which we rely, correctly affirmed the Commission's decision to approve the consolidation of the three railroads without imposing the additional conditions sought by petitioners. The fact-bound determinations challenged by petitioners do not conflict with any decision of this Court or of any other court of appeals. Therefore, further review is not warranted.

1. Petitioner KCS contends (84-621 Pet. 17-19) that a majority of the Commission did not approve the consolidation. The court below properly relegated this matter to the category of "[a]dditional, relatively minor, issues" as to

which the challenges to the Commission's decision were "without merit" (Pet. App. 13a).[11]

Three commissioners joined in the Commission's opinion without expressing any reservations (see Pet. App. 661a-666a). Chairman Taylor filed a concurring opinion that begins, "I endorse completely our decision to approve the primary and related applications with appropriate conditions, thereby allowing this consolidation to go forward" (Pet. App. 315a). Commissioner Simmons began his concurring opinion by stating: "I join in the Commission's decision to approve, with conditions, the consolidation of the Union Pacific, Missouri and Western Pacific rail systems" (Pet. App. 321a). Although both Chairman Taylor and Commissioner Simmons discussed some changes that might have been made in the Commission decision, they plainly endorsed the Commission decision. Thus, five of the six commissioners voted to approve the consolidation.[12]

KCS's argument is based upon the fact that the vote memoranda circulated by Chairman Taylor and Commissioner Simmons stated that they voted to approve the draft decision "subject to" suggested modifications (Pet. App. 656a, 657a). However, these memoranda, which are dated September 22 and 24, 1982, respectively, simply memorialize the results of a closed conference held on September 13, 1984 at which the Commission voted to *approve* the consolidations (see Pet. App. 653a). In light of this fact, and the subsequent issuance of the concurrences (Pet. App. 671a-674a), it is clear that notwithstanding their preference for

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[11]The court of appeals previously had rejected this argument when it denied KCS' request for a stay of the Commission's order. After the denial of the stay, KCS filed a motion for summary reversal based on this issue; that motion also was denied by the court of appeals. Pet. App. 12a n.5.

[12]Commissioner Andre dissented from the decision (see Pet. App. 323a).

additional conditions, Chairman Taylor and Commissioner Simmons each concluded that the consolidation, as conditioned in the Commission's opinion, was consistent with the public interest.[13]

2. KCS asserts (84-621 Pet. 19-24) that the court of appeals adopted an unduly deferential standard of review in upholding the Commission's determination that substantial public benefits would flow from the consolidation. However, at the outset of its analysis (Pet. App. 11a-12a), the court below set forth the standard of review, quoting from *Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d 392, 399-400 (5th Cir. 1980) (citation omitted), cert. denied, 451 U.S. 1017 (1981):

> "[it is not a court's task] to re-weigh the evidence or to draw [its] own inferences from the evidence before the Commission. [It] can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole."

This formulation is in full accord with the standard for review of Commission decisions prescribed by this Court. See *Illinois Central R.R.* v. *Norfolk & W. Ry.*, 385

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[13]KCS is incorrect in its assertion (84-621 Pet. 19) that the concurring opinions should be disregarded because they were not introduced at a formal collective voting conference of the ICC. See, *e.g.*, *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777, 785-786 (S.D. Tex. 1960), aff'd *sub. nom. Herrin Transp. Co.* v. *United States*, 366 U.S. 419 (1961).

Moreover, KCS's failure to raise this issue before the Commission precludes it from pressing the contention before this Court. See *Vermont Yankee Nuclear Power Co.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-554 (1978); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952).

U.S. 57, 66, 68-69 (1966); *Chicago, St. P., & O. Ry.* v. *United States*, 322 U.S. 1, 3 (1944); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88 (1944).

Petitioner KCS's argument that the court of appeals applied an improper standard of review is nothing more than an effort (84-621 Pet. 19-24) to raise before this Court its factual arguments concerning the calculation of the public benefits of the consolidation, arguments that were rejected by both the Commission (Pet. App. 84a-105a, 561a-562a, 581a-582a) and the court of appeals (*id.* at 22a-24a). Review of this wholly factual issue is not warranted. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

The Commission's determination of the benefits of the consolidation was a prediction of uncertain events, and such " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961). The court of appeals properly found (Pet. App. 23a-24a) that there was no merit in the challenges to the assumptions and methodology upon which the Commission's calculation of public benefits was based. It therefore properly upheld the Commission's determination that substantial benefits would result from the consolidation.[14] Further review of these factual issues is not warranted.

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[14]The pitfalls attending the recalculation of benefits urged by KCS are demonstrated by KCS's attempt to discredit the court of appeals' decision by reference to the $13.6 million reduction in car costs that all parties agree was appropriate (84-621 Pet. 23). A careful analysis of the Commission's finding regarding restatement of the applicants' car costs (Pet. App. 559a-560a) and of the Commission's adjustment of costs contained in Attachment C (Pet. App. 575a) shows that the $13.603

3. Petitioner KCS's principal argument (84-621 Pet. 9-16) is that the Commission should have granted KCS's request for trackage rights over a portion of the merged railroad in order to increase competition in certain markets, even though the consolidation did not adversely affect competition in those markets. The court below properly rejected this effort "to use the proposed consolidation as a springboard from which to launch a request for conditions having no connection with that consolidation" (Pet. App. 28a-29a).

KCS does not challenge the Commission's conclusion (Pet. App. 242a-244a; see also *id.* at 28a) that KCS's proposed conditions were not related to the competitive effect of the consolidation. It contends (84-621 Pet. 14-16) that both the Commission and the court of appeals erred by holding that the Commission need not consider conditions unless they are designed to ameliorate the anticompetitive effects of the consolidation under review (see Pet. App. 195a-196a, 28a-29a). The argument is based upon KCS's assertion (84-621 Pet. 12) that the Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, mandates the imposition of any condition that will increase

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million adjustment was made to reduce the applicants' estimate of a $25.014 million benefit from cars saved through improved utilization of existing cars. This was done by netting the value of equipment saved and the value of the additional equipment required to handle additional traffic, and applying the appropriate rate of return to that net figure. The figure that resulted, $11.411 million, was then deducted from the value of diverted traffic to reduce the value of that private benefit from the $40 million estimated by the Commission to $28.6 million, with a concomitant reduction in the overall benefits (but not the public benefits) of the merger. Compare Pet. App. 569a lines 1 and totals with Pet. App. 575a lines 1, 2(i) and totals. Thus, contrary to the contentions of KCS (84-621 Pet. 23), the Commission not only properly considered the $13.6 million reduction but also appropriately took account of the costs of additional equipment in computing the *private* benefits of the merger relating to diverted traffic.

competition. This contention is supported by neither the Act's language nor its legislative history.

The Interstate Commerce Act provides that "[t]he Commission shall approve [a merger] * * * when it finds the transaction consistent with the public interest" (49 U.S.C. 11344(c)). In making this determination, the Commission must consider the four factors set out in 49 U.S.C. 11344(b)(1) and the policies of the antitrust laws. *United States* v. *ICC*, 396 U.S. 491, 504 (1970).[15] The balancing of these factors is a matter for the Commission. *Penn-Central Merger Cases*, 389 U.S. 486, 498-499 (1968); *Illinois Central R.R.* v. *Norfolk & W. Ry.*, 385 U.S. at 68-69.

Section 11344(b) was amended by the Staggers Act to add a fifth factor to the Commission's consideration of proposed rail mergers — whether the transaction would have an adverse effect on competition among rail carriers in the affected region — which the Commission described simply as a "codification of [its] traditional approach to the evaluation of rail consolidations" (49 U.S.C. 11344(b)(1)(E); Pet. App. 78a). Petitioner KCS's suggestion (84-621 Pet. 12-16) that competition has been raised by the Staggers Act to be "the essential public-interest variable" (84-621 Pet. 12) is incorrect. The court of appeals properly rejected this assertion (Pet. App. 17a-18a), noting that:

> The increased emphasis on competition required by Congress modifies but does not basically alter the ICC's traditional approach, which has always considered the competitive impact of a proposed merger, but not to the exclusion of other factors. * * * * * The

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[15]The factors set out in the statute are: (1) the effect of the transaction on the adequacy of transportation; (2) the effect on the public interest of including other rail carriers in the area in the transaction; (3) the total fixed charges that would result from the transaction; and (4) the interest of employees. 49 U.S.C. 11344(b)(1)(A)-(D).

> Commission has always, and should continue, to perform a balancing test which takes a myriad of factors — including competition — into consideration * * *.

See also *United States* v. *ICC*, 396 U.S. at 513-514; *McLean Trucking Co.* v. *United States*, 321 U.S. at 87-88.[16]

Moreover, the Commission's refusal to consider conditions directed against anticompetitive effects unrelated to the consolidation actually furthers the procompetitive policy of the Staggers Act. The Commission determined that the use of its conditioning power "to make consolidation proceedings vehicles for rail system restructuring" was contrary to Congress' intent that private initiatives govern the structuring of the rail system (Pet. App. 196a-197a). This conclusion was approved by the court of appeals (*id.* at 28a). Since intrusion into the market by federal regulators is precisely what Congress was seeking to limit in enacting the Staggers Act (see 49 U.S.C. 10101a(1) and (2)), the Commission's approach is fully consistent with its statutory mandate.

In addition, expanding the scope of consolidation proceedings as suggested by KCS "would substantially increase their complexity * * * [and] increase the time required to decide these cases" (Pet. App. 197a). Such an increase in delay resulting from the regulatory process, and the possibility that a variety of unwarranted and burdensome conditions could be imposed on a railroad that sought approval of a merger, could discourage mergers that would be procompetitive and beneficial to the public and hinder the private restructuring of the rail industry that Congress sought to promote.

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[16]The court below held (Pet. App. 18a-22a) that the Commission gave full consideration to the competitive factors contained in the National Rail Transportation Policy, 49 U.S.C. 10101a, which was enacted as part of the Staggers Act.

In short, the Commission has exercised its authority to "determin[e] that * * * conditions imposed upon the consolidation had rendered that consolidation consistent with the public interest" (Pet. App. 28a). Since that determination was based upon the proper legal standard and was supported by the evidence, and since the Commission has "extraordinarily broad discretion to impose [such] protective conditions" (*id.* at 25a), further review of this question is not warranted.[17]

4. Petitioners BMWE et al. do not challenge the Commission's decision to impose conditions protecting the employees of the parties to the transaction. They assert (84-641 Pet. 15-20) that the statute directing the Commission to require protective provisions for employees "affected by the transaction" (49 U.S.C. 11347) also mandates the protection of the jobs of employees of railroads that are not parties to the consolidation if those employees' jobs might be affected by the consolidation.[18] The Commission did

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[17]Petitioner KCS's argument (84-621 Pet. 16 n.19) that the Commission's position with regard to this issue is an impermissible "rulemaking by adjudication" is wholly without merit. This Court has consistently held that an agency may formulate and apply policies in adjudications as long as the agency's action comports with fairness. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-204 (1947). Here, the Commission did not apply a new policy to KCS' request for trackage rights. The policy in question was based upon the Commission's prior policy statement, *Railroad Consolidation Procedures*, 366 I.C.C. 75, 92 (1982), and had been applied previously, with the approval of the United States Court of Appeals for the Fifth Circuit, in *Burlington Northern, Inc.—Control & Merger—St. Louis (BN/Frisco)*, 360 I.C.C. 788, 950-952 (1980), aff'd *sub nom. Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d 392 (1980), cert. denied, 451 U.S. 1017 (1981). In that decision the Commission stated that conditions on a consolidation should not be used to ameliorate longstanding problems that are not related to the consolidation under review. See Pet. App. 195a-196a.

[18]These petitioners also argue (84-641 Pet. 11-15) that the Commission's consideration of "the interest of carrier employees affected by the transaction" (49 U.S.C. 11344(b)(1)(D)) must include the effect of

consider additional conditions to protect such employees (Pet. App. 277a-278a), but concluded that they were not required. The decisions of the Commission (*id.* at 278a-281a) and of the court below (*id.* at 34a)[19] that the Commission is not required to impose such conditions are consistent with the decisions of all of the courts of appeals that have considered the question. See *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 323-34; *Brotherhood of Maintenance of Way Employees* v. *ICC*, 698 F.2d 315, 316-318 (7th Cir. 1983); *Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d at 410-413; see also *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).[20] In addition, the Commission consistently has interpreted 49 U.S.C. 11347 and its predecessor sections as requiring protection only for employees of

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the transaction upon all railroad employees, including employees of railroads that are not parties to the transaction. Since the Commission specifically considered the interests of persons employed by railroads other than the applicants (Pet. App. 60a, 225a, 271a-278a, 281a), this Court need not address this issue.

[19]The court of appeals (Pet. App. 34a) relied upon its prior decision in *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 323-324, in concluding that the Commission's interpretation of 49 U.S.C. 11347 was correct. The court in *Lamoille Valley R.R.* rested its decision on four points. First, it noted that the agency's reading of the statute was "sensible," because Section 11347 refers only to the rail carrier involved in the merger transaction and "its employees" (711 F.2d at 323). Second, the court noted that the legislative history of the statute supported the Commission's interpretation (*ibid.*). Third, the court found that the Commission's interpretation is "supported by considerations of practicality and administrative economy" (711 F.2d at 323-324), because it would be nearly impossible to rebut allegations that non-applicant carrier employees were adversely affected by a proposed merger. Finally, the court relied upon the agency's consistent interpretation of these sections of the Interstate Commerce Act (711 F.2d at 324).

[20]These decisions are in accord with the weight of district court authority prior to 1975 when Commission decisions were reviewed by three-judge district courts rather than by the courts of appeals. See *Florida East Coast Ry.* v. *United States*, 259 F. Supp. 993, 1019 (M.D.

the merging carriers. This longstanding administrative interpretation is entitled to substantial deference. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Accordingly, absent a conflict among the circuits, there is no warrant for further review by this Court on this point.

5. Petitioner Wheeler asserts that the Commission failed to discharge its obligation to ensure that the merger proposal is fair to minority shareholders (see *Schwabacher* v. *United States*, 334 U.S. 182, 198-201 (1948)). These arguments were properly rejected by the Commission (Pet. App. 298a-306a) and the court below (*id.* at 35a-38a).

Petitioner's principal contention (84-633 Pet. 6-12) is that the Commission failed to consider the value of WP's industrial land holdings, and therefore improperly rejected his challenge to the price offered to WP stockholders. Petitioner bases his argument upon the Commission's observation that land values are of little significance in determining the value of stock in an operating railroad (Pet. App. 302a),

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Fla. 1966), aff'd, 386 U.S. 544 (1967); *Railway Labor Executives' Ass'n* v. *United States*, 226 F. Supp. 521, 525 (E.D. Va.), vacated on other grounds, 379 U.S. 199 (1964).

Petitioners BMWE et al. rely on *Railway Labor Executives' Ass'n* v. *United States*, 216 F. Supp. 101 (E.D. Va. 1963), and the Commission's decision in *Pennsylvania R.R.—Merger*, 347 I.C.C. 536, 546 (1974). However, as two courts of appeals have noted, *Railway Labor Executives' Ass'n* rests on its own peculiar facts. *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 331; *Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d at 411 n.46. *Pennsylvania R.R.* involved the merger of subsidiaries of the same railroad (see 347 I.C.C. at 546), and therefore is inapposite because only employees of subsidiaries of the merging carriers —who therefore were employees of the applicants — were protected. See *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 324 n.60. *Soo Line R.R.* v. *United States*, 280 F. Supp. 907 (D. Minn. 1968), also relied on by petitioners (84-641 Pet. 16-18), does reach a contrary interpretation of the Interstate Commerce Act's employee protection section, but that aberrant decision has been rejected by the courts of appeals.

but that statement referred to the Commission's decision that the value of stock in a going concern such as a railroad "is to be measured by earnings power rather than * * * book value which may never be realized" (*id.* at 303a). Thus, the Commission did not find the land holdings irrelevant, it simply decided to account for those holdings indirectly, rather than directly, in the valuation process (see *id.* at 37a).

The Commission's decision to utilize a valuation method based upon the railroad's earning power (its "going concern" value) and not its book value is consistent with its prior decisions concerning this issue. See *Missouri Pac. R.R.—Securities*, 347 I.C.C. 377, 411 (1973); *Seaboard Air Line R.R.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 193 (1963); cf. *Consolidated Rock Co.* v. *Dubois*, 312 U.S. 510, 526 (1941). The record clearly indicates that the value of WP's land was reflected in the methodology used by the Commission to determine the stock's going concern value. As the court of appeals found (Pet. App. 37a), the hypothetical market price for the stock constructed by the Commission included the value of the land. This is because "in a free and actively traded [securities] market, absent compelling reasons to believe otherwise, the market price is held to take account of asset value as well as the other economic, political, and financial factors that determine 'value.' " *Seaboard World Airlines, Inc.* v. *Tiger International, Inc.*, 600 F.2d 355, 361-362 (2d Cir. 1979); see also *Mills* v. *Electric Auto-Lite Co.*, 552 F.2d 1239, 1245-1247 (7th Cir.), cert. denied, 434 U.S. 922 (1977).[21]

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[21]Petitioner Wheeler asserts (84-633 Pet. 8 n.3) that the Commission improperly relied upon stock market prices in ascertaining the railroad's going concern value. His claim that the Commission's prior decisions bar the use of this methodology is incorrect. As petitioner admits (*ibid.*), these decisions indicate that market prices are one appropriate measure of going concern value. See, *e.g.*, *Louisville &*

The value of WP's land holdings also was taken into account in setting the negotiated price of twenty dollars per share. As the Commission indicated (Pet. App. 301a), Salomon Brothers, the investment bankers retained to advise WP's Board of Directors, considered all elements of value in the WP enterprise, including book value and net asset value (*id.* at 298a-299a, 301a), in determining a fair price for the stock.[22] The Commission relied upon this negotiated price in approving the fairness of the transaction (*id.* at 306a). The court of appeals satisfied itself that

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N.R. Co.—Merger, 295 I.C.C. 457, 498 (1957). Moreover, even if the Commission did apply a slightly different test in this case, petitioner Wheeler has cited no authority to support his apparent view that the Commission cannot change the methodology used to ascertain going concern value. Cf. *American Trucking Ass'n* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) (the Commission is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday"). The state law cited by Wheeler (84-633 Pet. 10-12) obviously does not bind the Commission (*Schwabacher* v. *United States*, 334 U.S. 182, 198 (1948)).

Wheeler's attempt (84-633 Pet. 8 n.3) to show that the stock's market price was an unreliable indicator of WP's earning power also is unavailing. His unsupported, improbable assertions that neither the financial community nor the WP Board of Directors (advised by an independent investment banking firm, Salomon Brothers) was aware of the value of the land holdings and that these holdings were not taken into consideration by UP in establishing its offer provide no basis for rejecting the market price approach. His conclusory statement (*ibid.*) that the market price was "depressed" also is insufficient to undercut the Commission's analysis.

[22]Petitioner Wheeler contradicts the record when he asserts (84-633 Pet. 3) that the negotiated twenty dollars per share figure was based solely on WP's "stand alone" value and did not reflect the current value of WP's real estate or the stock's increased value as a result of the merger (see Pet. App. 298a-301a). He contradicts himself when he telescopes the several months of negotiations (84-633 Pet. 3 ("fall of 1979 * * * January 18, 1980")) to "but one afternoon" (*id.* at 10 n.5).

there was substantial record evidence to support the Commission's conclusion that this price was arrived at as a result of arm's length negotiations between WP and UPC (*id.* at 37a). As the court of appeals noted (*id.* at 38a, quoting *United States* v. *ICC*, 396 U.S. at 520):

> "although the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of the merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met."

Under this standard, there is no warrant for further review of this issue.[23]

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[23]Petitioner Wheeler's challenge (84-633 Pet. 13) to the Commission's "merger premium analysis" also is meritless. As the court of appeals found (Pet. App. 36a), the Commission properly considered the enhanced value of WP stock as a result of the merger. Petitioner Wheeler's claim is fatally flawed by his misunderstanding of the Commission's construction of the "premium." The Commission found that the present value of the stock's market value, including the "premium," was $38. However, this determination did not reflect the allocation of the benefits of the merger between the two parties to the merger (see Pet. App. 304a-305a). Allocation of these benefits reduced the stock's constructed value to a range of $16.25 to $26.25 (*id.* at 305a-306a). The $20 per share price offered to stockholders falls within this range, and therefore qualifies as fair and reasonable.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

ROBERT S. BURK
Acting General Counsel

HENRI F. RUSH
Acting Deputy General Counsel

JOHN J. MCCARTHY, JR.
LAURENCE H. SCHECKER
Attorneys
Interstate Commerce Commission
Washington, D.C. 20423

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